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No. 08-1374

Supreme Court, U.S.
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In The

Supreme Court of the United States

CHRIS ROBINSON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER DEFENDANT-SPECIFIC DRUG QUANTITY FINDINGS MUST BE MADE FOR PURPOSES OF TRIGGERING THE ENHANCED PENALTY PROVISIONS OF 21 USC SECTIONS 841(b)(1)(A) AND (b)(1)(B) 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Blumenthal vs. U.S., 332 U.S. 539 (1947) 6
Burns vs. United States, 501 U.S. 129 (1991).....7
Edwards vs. United States, 523 U.S. 511 (1998).....5
U.S. vs. Banuelos, 322 F. 3d 700 (9th Cir. 2003) 2
U.S. vs. Collins, 415 F. 3d 304 (4th Cir. 2005).....2
U.S. vs. Cotton, 535 U.S. 625 (2002).....4
U.S. vs. Darwich, 337 F. 3d 645 (6th Cir. 2003) 6
U.S. vs. Lanni, 970 F. 2d 1092 (2nd Cir. 1992).....7
U.S. vs. Okayfor, 996 F. 2d 116 (6th Cir. 1993) 7
U.S. vs. Pruitt, 156 F. 3d 638 (6th Cir. 1998) 3
U.S. vs. Tomasino, 206 F. 3d 739 (7th Cir. 2000) 7

STATUTES

18 USC Section 3553(a)(2) 7
21 USC Section 841(b).....1, 6
21 USC Section 841(b)(1)(A) 1, 2, 6
21 USC Section 841(b)(1)(B) 1, 6
21 USC Section 846 3
28 USC Section 991(b)(1) 7

TABLE OF AUTHORITIES – Continued

Page

U.S. SENTENCING GUIDELINES

USSG 1A4(a) 8

USSG 1B1.3(a)(1)(B) 7, 8

USSG 3B1.2 8

REPLY BRIEF OF PETITIONER CHRIS ROBINSON

ARGUMENT

THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER DEFENDANT-SPECIFIC DRUG QUANTITY FINDINGS MUST BE MADE FOR THE PURPOSES OF TRIGGERING THE ENHANCED PENALTY PROVISIONS OF 21 USC SECTIONS 841(b)(1)(A) AND (b)(1)(B).

The government's brief in opposition to the petition for certiorari acknowledges (p. 13) the circuit split on the single issue raised, which is whether, for purposes of applying the enhanced penalties of 21 USC Section 841(b), triggered by drug quantity thresholds, those thresholds may be determined on a conspiracy-wide basis or must be defendant-specific.

A substantial portion of the government's brief is devoted to a recitation of a government-friendly version of the facts of the case, many or most of which (e.g. Petitioner's assistance in warning of police investigation, p. 3 of government's brief) arguably support an inference of conspiracy, but have no relevance to this issue. Some of those facts were recited by the Sixth Circuit's opinion; some were not. The Sixth Circuit had before it several issues which are no longer relevant, notably, the sufficiency of evidence to support the conspiracy conviction.

The government has set forth as fact virtually everything Juan Valentin, its primary witness,

testified to, notwithstanding that he himself pled guilty to the drug conspiracy and that his testimony was critical if he himself were to avoid a life sentence. Presumably, this was done to cast Chris Robinson in an undeserving light. However, there is every reason to believe – in fact, the proposition is virtually compelled – that the jury in this case was skeptical of his testimony. The government's brief (p. 17) suggests that the requisite five-kilogram cocaine quantity necessary for the life-sentence-mandating provisions of 21 USC Section 841(b)(1)(A) could be reached through a process of extrapolating the per-week quantity Valentin claimed he sold Chris Robinson for a period of 45 weeks. This means of establishing the five-kilogram mark was suggested by AUSA Piper in his closing argument. It was, however, virtually certain to have been rejected by the jury; otherwise, the jury would have had no occasion to be asking for guidance as to whether the Petitioner would have to know about or be personally involved with a particular quantity for it to count against the statutory threshold for an enhanced sentence.

Another major portion of the government's brief is directed to the support of the proposition that the circuit-level authority (*U.S. vs. Collins*, 415 F. 3d 304, 313-314 (4th Cir. 2005) and *U.S. vs. Banuelos*, 322 F. 3d 700, 704-705 (9th Cir. 2003), both cited in Robinson's original petition in opposition to its position), is simply wrong. Its most basic argument is that this authority violates the plain language of the statute and Congressional intent. Authority is cited

(government's brief, pp. 8-9) for the proposition that since several courts have held that a defendant assumes the risk of the quantity he is in possession of in the substantive, non-conspiracy context, the same rule should apply where conspiracy is charged; i.e., that an individual defendant should assume the risk of quantities others were handling, even where the defendant had no knowledge of those quantities, they were not foreseeable to him, and they did not advance the cause of the conspiracy. The fundamental unfairness is much higher where his risk consists of what others are doing, unknown and unforeseeable to a defendant.

The matter of attribution of drug quantity where the offense is substantive and non-inchoate is relatively straightforward, logically rendering a Congressional statement or clarification unnecessary. As the government points out, however, a drug conspiracy is an inchoate offense which does not require any overt act for the crime to be complete (government's brief, p. 12). The government further points out that 21 USC Section 846 specifies that the punishment for conspiracy is the same as for the crime which is the object of the conspiracy. That being the case, numerous questions present themselves, which Congress has addressed either not at all or only indirectly. Courts have held, though Congress has not spoken, that the particular quantity necessary to trigger the enhanced penalties need not be agreed or even under contemplation (e.g. *U.S. vs. Pruitt*, 156 F. 3d 638 (6th Cir. 1998)), contrary to

what would seem to be the most logical rule, given the definition of conspiracy. An agreement is sufficient under this authority so long as the substantive acts of the conspiracy ultimately reach the required total. An obvious corollary is that a particular defendant need not have been a party to a quantity-specific agreement. His knowledge could suggest only a small quantity; the government's position would expose him to punishment corresponding to unlimited quantities.

The government's brief cites the case of *U.S. vs. Cotton*, 535 U.S. 625 (2002) for the proposition that this Court has implicitly approved its position on the issue in this case. This is incorrect. The issue in *Cotton* was whether the failure to specify drug quantity in the indictment, unobjected to at the trial level, deprived the trial court of jurisdiction or justified plain-error relief. What was *not* at issue was the question of whether quantity determinations were to be conspiracy-wide or defendant-specific; indeed, in the pre-*Apprendi* setting of Cotton's trial, the district court made defendant-specific quantity determinations: "The District Court found, based on the trial testimony, respondent Hall responsible for at least 500 grams of cocaine base, and the other respondents responsible for at least 1.5 kilograms of cocaine base", *Cotton* at 628. The opinion contains no indication of criticism of this practice or that it was unnecessary; nor did the government argue that the trial court had erred in failing to hold Mr. Hall

accountable for the higher quantities attributed to his co-conspirators.

Petitioner stands by his original (Petition for Certiorari, pp. 9, 10), quotations from the case of *Edwards vs. United States*, 523 U.S. 511 (1998), which held that, under the facts of that case, relevant-conduct provisions of the U.S. Sentencing Guidelines mooted the question of whether the sentencing court was required to resolve the ambiguity in the jury's verdict (cocaine base vs. powder cocaine) in the defendant's favor; specifically noting, however, that had the question been whether a sentence exceeding the default statutory maximum for a cocaine-only conspiracy was supportable, it " . . . would [have made] a difference . . . ", *Edwards* at 515. This is identical in principle to the Robinson facts, the only difference being that here, quantity rather than drug type triggered the higher statutory sentence.

The government has asserted that the Respondent has waived the quantity-determination issue at numerous junctures and that therefore, any review by this Court must test its merits under plain-error standards. Specifically, the issue is said to have been waived because it was not asserted in opposition to the original jury instructions nor the jury verdict form, nor at sentencing. It is true that Petitioner's counsel did not raise an objection to the original jury charge nor verdict form, but he did object when the jury posed its question, when the matter was still firmly in the control of the trial court, which was

persuaded by the unsupported statement from the Assistant U.S. Attorneys prosecuting the case that a forseeability limitation was unnecessary (Petition for Certiorari, App. pp. 42-43). No authority is cited to suggest that this would be insufficient for preserving the matter at the trial stage. Similarly, this issue has nothing to do with and is accordingly not properly raised at a sentencing hearing; it is a trial issue. The drug quantity determination for purposes of the enhanced-penalty provisions of 21 USC 841(b)(1)(A) and (b)(1)(B) must be found as an element of the offense. Each of the subsections of 21 USC Section 841(b) constitutes a separate offense with separate elements which all must be proved beyond a reasonable doubt when a defendant guilty of a conspiracy is sentenced in excess of the default statutory maximum, *U.S. vs. Darwich*, 337 F. 3d 645, 655 (6th Cir. 2003).

The Sixth Circuit did not suggest that this issue was waived or that it was limited to plain error review (though an issue which is not on appeal at this point was so treated, and that court could not determine whether a second one was).

The government's position on the merits of the issue in this case raises the prospect of massive sentencing disparity. The law is well settled (*Blumenthal vs. U.S.*, 332 U.S. 539, 556-557 (1947)) that a defendant need not know all of his co-conspirators nor the full scope of the conspiracy. Per the government's position, the lowliest lackey in the drug operation, completely unaware of the scope of the operation, is

held to the same penalties, under an assumption-of-risk standard, as the kingpin who walks away with virtually all of the profit and other perks the operation has enabled. Unwarranted sentencing disparity has been soundly condemned, and Congress's promulgation of the sentencing guidelines had as a focal point, not to say *the* focal point, its elimination, this being the second-listed (after reference to 18 USC Section 3553(a)(2)) objective assigned to the U.S. Sentencing Commission by 28 USC Section 991(b)(1). The purpose of the guidelines is to eliminate the "unwarranted disparit[ies] and . . . uncertainty" associated with indeterminate sentencing, *Burns vs. United States*, 501 U.S. 129, 133 (1991). As pointed out in the original Petition for Certiorari in this cause (pp. 12-13), those guidelines (USSG 1B1.3(a)(1)(B) in particular) impose a forseeability limitation on relevant conduct which drives the offense level for sentencing purposes. " . . . [A] defendant is chargeable for the drug transactions of other members of the conspiracy only if they were known to him or were reasonably foreseeable to him." *U.S. vs. Okayfor*, 996 F. 2d 116, 120 (6th Cir. 1993). " . . . [A] sentencing judge may not, without further findings, simply sentence a defendant according to the amount of narcotics involved in the conspiracy." *Id.* at 120-121, quoting *U.S. vs. Lanni*, 970 F. 2d 1092, 1093 (2d Cir. 1992).

A presumption of regularity attaches to the U.S. Sentencing Commission's compliance with its congressional mandate, *U.S. vs. Tomasino*, 206 F. 3d

739, 742 (7th Cir. 2000), *rehearing granted* 230 F. 3d 1034. Accordingly, USSG 1B1.3(a)(1)(B) may be said to enjoy this presumption *vis-à-vis* the Commission's mandate, especially given its centrality in the implementation of the "real offense" component of federal sentencing as described in USSG 1A4(a).

This result is applicable as well to the sentencing guideline (USSG 3B1.2) reducing a defendant's sentencing exposure for his minor role in the offense.

In sum, it is the government's position, not that of the Petitioner, which cannot be reconciled with what may be inferred as Congressional intent.

Knowledge or at least forseeability is necessary to avoid unwarranted disparity in sentences.

CONCLUSION

The Court should grant the writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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